

1 After submission of its response to the Commission's Order to Show Cause, Jackson Purchase and Commission Staff stipulated the facts surrounding this incident. Jackson Purchase subsequently moved to consolidate this case with Cases No. 93-043 and 93-145 for the purpose of presenting evidence and oral argument on certain legal issues. By Order dated September 2, 1993, the Commission granted this motion. The Commission held a hearing in these cases on December 1 and 2, 1993.

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:²

1. Jackson Purchase is a Kentucky corporation which owns and operates facilities used in the distribution of electricity to the public for compensation for light, heat, power, and other uses.

2. Jackson Purchase is formed under the provisions of KRS 279.010 to KRS 279.220.

3. T.L. Riley Construction Company ("T.L. Riley") has performed construction services for Jackson Purchase since September 24, 1984. When requested by Jackson Purchase, T.L. Riley supplements Jackson Purchase's work force in construction, rebuilding, and retirement of overhead electrical distribution lines.

4. On February 8, 1991, T.L. Riley entered into a contract ("the contract") with Jackson Purchase to construct and install certain utility plant.

5. The contract provides, inter alia, that:

a. T.L. Riley's manner of performance of work and equipment are subject to Jackson Purchase's inspections, tests, and approvals.

b. T.L. Riley take all reasonable precautions for the safety of the public and employees at the work site, and comply with all applicable provisions of federal, state, and

² In this Order, the Commission addresses three issues: (1) Did Jackson Purchase willfully violate Commission Regulation 807 KAR 5:041, Section 3, when installing a new utility pole and transformer at Vaughn's Chapel Road in Marshall County, Kentucky on October 28, 1992? (2) Did Jackson Purchase willfully violate Commission Regulation 807 KAR 5:041, Section 3, in its operation of the utility pole located at the incident site? (3) Did Jackson Purchase willfully violate 807 KAR 5:006, Section 24, by failing to execute its safety program?

municipal safety laws and building and construction codes, as well as Jackson Purchase's safety rules and regulations.

c. T.L. Riley maintain public liability and property damage liability insurance.

d. T.L. Riley comply with all applicable statutes, ordinances, rules and regulations pertaining to the work.

6. The contract does not require Jackson Purchase to place a supervisor at any construction site to supervise or inspect the work which T. L. Riley performed within the contract's scope.

7. On October 28, 1992, T.L. Riley was installing a new utility pole and transformer at Vaughn's Chapel Road in Marshall County, Kentucky, to serve a new Jackson Purchase customer.

8. While working on the primary connection between the single phase primary electric line and the newly installed transformer, T.L. Riley employee James Fox came into contact with a 7200 volt energized jumper and suffered burns to his head and hands.

9. At the time of the incident, Fox was not wearing rubber gloves.

10. At the time of the incident, Jackson Purchase owned the facilities in question.

11. At the time of the incident, Fox was an employee of T.L. Riley and was performing work in the scope of his employment. This work was in the scope of the February 8, 1991 construction contract between T.L. Riley and Jackson Purchase.

12. Jackson Purchase's safety rules, as of October 28, 1992, required Jackson Purchase employees to use rubber gloves when working near energized equipment.

13. At the time of the incident, T.L. Riley and Fox knew the requirements of the National Electrical Safety Code and Jackson Purchase's safety rules.

14. At the time of the incident, Jackson Purchase inspected all facilities which T.L. Riley constructed and installed under the February 8, 1991 contract. These inspections were performed at the end of each project to verify the facilities' proper construction and NESC compliance.

15. On October 29, 1992, the cable television ("CATV") conductor attached to the utility pole involved in the incident ("the CATV conductor") had a vertical clearance to ground elevation of 11 feet, 8.5 inches.

16. At the time of the incident, Cable Vision, Inc. owned the CATV conductor.

17. Prior to the incident, Jackson Purchase last inspected the facilities in question on January 24, 1992. It made a visual inspection at each pole location and service conductor location and noted no vertical clearance violations. No Jackson Purchase employee performed any work in the area between January 24, 1992 and October 29, 1992.

18. On January 24, 1992, no private driveway ran underneath the span of the CATV conductor.

19. Between January 24, 1992 and October 29, 1992, a driveway was constructed under the CATV conductor.

The Commission makes the following conclusions of laws:

1. Jackson Purchase is a utility subject to Commission jurisdiction. KRS 278.010(3)(a) and 279.210.

2. KRS 278.030(2) provides that "[e]very utility shall furnish adequate, efficient and reasonable service" The delivery of safe service is synonymous with "adequate" and "reasonable" service.

3. KRS 278.280(2) provides:

The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by the utility, and, on proper demand and tender of rates, the ***utility shall furnish the commodity or render the service within the time and upon the conditions provided in the rules*** [bold italics added].

4. Commission Regulation 807 KAR 5:041, Section 3, states:

A utility shall construct and maintain ***its plant and facilities*** in accordance with good accepted engineering practices. Unless otherwise specified by the commission, ***the utility shall use applicable provisions in the following publications as standards of accepted good engineering practice for construction and maintenance of plant and facilities***, herein incorporated by reference: . . . National Electrical Safety Code [bold italics added].

5. Commission Regulation 807 KAR 5:041, Section 3, requires Jackson Purchase to maintain its plant and facilities in accordance with the standards of the National Electrical Safety Code (1990 ed.). This duty may not be delegated. It runs with the ownership of the utility plant and facilities, not with who performs the actual work. See Snyder v. Southern California Edison Co., 285 P.2d 912 (Cal. 1955).

6. National Electrical Safety Code (NESC) Section 44 (441A) prohibits persons from approaching energized equipment unless, inter alia, they are insulated from energized parts or the equipment is deenergized.

7. Fox's failure to wear rubber gloves while working near energized equipment is a violation of NESC Section 44 (441A).

8. Jackson Purchase failed to comply with the NESC when constructing and maintaining its plant and facilities at the incident site.

9. A willfull violation "denotes an act which is intentional rather than accidental." Screws v. U.S., 325 U.S. 91, 101 (1945). It "means 'knowing' violation or 'knowing failure to comply.'" Oldham v. Kubinski, 185 N.E.2d 270, 280 (Ill. App. 1962). See, Muncy v. Commonwealth, Ky., 97 S.W.2d 606, 609 (1936) ("The word 'willfull' in its general acceptance means intentionally, not accidentally nor involuntarily."); Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 905 (1992) (The term "willfull" does not necessarily and solely entail an "intention to do wrong and inflict injury," but may include conduct which reflects "an indifference to . . . [its] natural consequences."). See also Woods v. Corsey, 200 P.2d 208, 211 (Cal. App. 1948) (A willfull violation is "one which is intentional, knowing, voluntary, deliberate or obstinate . . .").

10. Fox's violation of NESC Section 44 (441A) was willfull.

11. At the time of the incident, Fox was acting for Jackson Purchase and within the scope of his employment.

12. KRS 278.990(1) states:

If any utility **willfully** violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has

been provided by law, or fails to obey any order of the commission from which all rights of appeal have been exhausted, the utility shall be subject to a civil penalty to be assessed by the commission for each offense not less than twenty-five dollars (\$25.00) nor more than two thousand five hundred dollars (\$2,500). ***Each act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed to be the act, omission, or failure of the utility.*** [Bold italics added.]

13. Based upon the principle of imputed liability contained in KRS 278.990(1), Jackson Purchase willfully violated Commission Regulation 807 KAR 5:041, Section 3, by failing to comply with NESC standards while constructing and maintaining its plant and equipment. For its willfull failure to comply with Commission Regulation 807 KAR 5:041, Section 3, Jackson Purchase should be assessed a penalty of \$500.

14. NESC Section 232B1 required a minimum vertical clearance of 15.5 feet for the communications conductor in question.

15. On October 29, 1992, the CATV conductor failed to meet NESC minimum vertical clearance standards and was in violation of NESC Section 232B1.

16. Had the private driveway not ran underneath it, the CATV conductor would have met NESC clearance standards.

17. Utility poles are "an essential part of the facilities of most regulated utilities." Kentucky CATV Association v. Volz, Ky.App., 675 S.W.2d 393, 396 (1983). They are the supporting structures for a wide variety of utility facilities, including high voltage electric conductors, transformer equipment, telephone conductors and CATV conductors. In many cases, they are connected to the same anchors and guy wires which moor and stabilize utility poles.

18. A utility pole attachment's operation and maintenance is inseparable from that of its supporting utility pole. If a pole attachment is not operated and maintained in accordance with the NESC, then neither is the utility pole to which it is attached. A pole attachment's non-compliance poses a safety risk not only to itself but also to the utility pole, other pole attachments and to the general public. The utility pole, therefore, cannot be considered as operating in accordance with acceptable engineering standards unless all of its attachments comply with those standards.

19. Jackson Purchase failed to operate and maintain the utility pole to which the CATV conductor was attached in accordance with acceptable engineering standards and thus failed to comply with Commission Regulation 807 KAR 5:041, Section 3.

20. Jackson Purchase's failure to operate and maintain the utility pole to which the CATV conductor was attached in accordance with acceptable engineering standards was not a willfull failure to comply with Commission Regulation 807 KAR 5:041, Section 3, and therefore does not subject the utility to penalty.

21. Commission Regulation 807 KAR 5:006, Section 24,³ requires a utility to "adopt and execute a safety program appropriate to its size and type of operations." A utility fails to "execute" its safety program when it fails to enforce the safety rules which it has established.⁴

³ In its Order of February 9, 1993, which initiated this proceeding, the Commission erroneously referred to this regulation as Commission Regulation 807 KAR 5:006, Section 22.

⁴ Case No. 94-013, Jackson Purchase Electric Cooperative Corporation, Inc. - Alleged Violation of Commission Regulations 807 KAR 5:006 and 807 KAR 5:041, slip op. at 3 (Jun. 19, 1995).

22. The record fails to show that Jackson Purchase willfully failed to enforce its safety rules during the time of the incident.

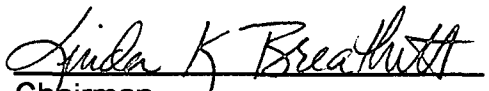
IT IS THEREFORE ORDERED that:

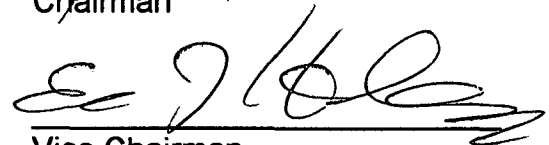
1. A penalty in the amount of \$500 is assessed against Jackson Purchase for its willfull failure to comply with Commission Regulation 807 KAR 5:041, Section 3.

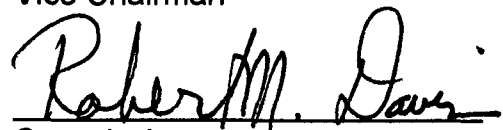
2. Jackson Purchase shall pay the assessed penalty within 20 days of the date of this Order by certified or cashier's check made payable to "Treasurer, Commonwealth of Kentucky." This check shall be delivered to Office of General Counsel, Public Service Commission of Kentucky, 730 Schenkel Lane, P. O. Box 615, Frankfort, Kentucky, 40602.

Done at Frankfort, Kentucky, this 14th day of August, 1996.


PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director